



Deciphering Sovereign Lands



When it joined the union, the federal government gave North Dakota ownership of "navigable" waters within the state. That public ownership remains vital today, though differences of opinion over boundary definitions are becoming more numerous.

By Craig Bihle



Left: These sandbars formed in the Missouri River between Bismarck and Mandan are obvious sovereign land and open to public recreation such as shore fishing or just taking a rest from a day on the water.

Above: Sovereign land can also extend inland from the water's edge, as is the case with the foreground shoreline in this photo. Where public sovereign land ends, and adjoining privately-owned land begins, however, is sometimes not easily determined.

Thousands of North Dakotans use sovereign land for hunting, fishing or other recreation and may not even know it.

A Missouri River goose hunter who boats to a sandbar to set up decoys (in areas where goose hunting is allowed) benefits from sovereign land.

So do Missouri River anglers who pull up to a bare shoreline for a family picnic, and folks who shorefish for paddlefish in some places along the Yellowstone River.

The common link through these activities is that they take place along or within the banks of major rivers in the state, where state law provides for public access and use of an area between the shoreline and the boundary of adjacent private property.

The beds of these waters, called sovereign lands, are owned by the state and are held in trust for the benefit of the public. In some cases this sovereign land can extend several hundred yards inland from the actual edge of the water. It is also possible for the edge of the water to extend beyond the public land.

In state law, sovereign land is defined as "those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams."

Those areas identified as "navigable" waters include the entire lengths of the Missouri River and Yellowstone River within North Dakota, the Red and Bois de Sioux rivers, the James River, Upper Des Lacs Lake and Devils Lake. Other bodies of water not specifically listed in the law may be navigable as well. A body of water is navigable if it was able to be used at statehood as a highway of commerce.

In the case of rivers, streams or lakes not specifically defined as navigable, the state, and therefore the public, still own the water. People can boat, canoe and fish over these waters, however, the beds and shoreline of non-navigable waters are private property.

In the last century, with the exception of a few major court cases, sovereign land use generally attracted little attention. That is starting to change. More and more people seek public property, including the state's major rivers, for hunting, fishing and water recreation, while others look to those same waterways as the front yard of their dream home or the back yard of their private nature retreat. Conflicts arise when recreationists stray too far from the river's edge and onto private land, or when riverside landowners attempt to prohibit public activity on shoreline areas that citizens have a legal right to access.



In state law, sovereign land is defined as "those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams."



*North Dakota law states:
“Sovereign lands may not be
permanently relinquished but
must be held in trust for the
benefit of the citizens of the
state of North Dakota.”*

Just such a scenario has sparked controversy in an area near the confluence of the Yellowstone and Missouri rivers southwest of Williston. Bowhunters have for years boated up the Missouri or Yellowstone to get to hunting spots they always assumed were sovereign public land, and were never challenged otherwise. In the past year or two, however, they have found “No Hunting” signs on that same land, and have reportedly been asked to leave by adjacent landowners, or hunting guides who leased access rights to private land adjacent to the river.

Are the private landowners trying to prevent legal access to land that is publicly owned? Or perhaps the bowhunters were always actually on private land and just never realized it. The questions are many and the answers are not usually black or white. “This is such a complex issue,” admits Daryl Kleyer, North Dakota Game and Fish Department game warden at Williston, caught in the middle because his job involves protecting rights of both hunters and landowners.

Just about everyone else who might be involved in sorting out the confusion, from state officials to private attorneys, would probably agree.

No Lines in the Sand

While sovereign land is addressed and defined in state law for *what* it is, maps and legal descriptions seldom define exactly *where* it is.

Other types of public land are registered in fee title with surveyed boundary descriptions. Lines dividing public and private property boundaries are drawn on maps. Some kinds of public land, like Game and Fish Department wildlife management areas, or U.S. Fish and Wildlife Service waterfowl production areas and national wildlife refuges, are fenced and signed.

Tracts of other types of public land, like state school land or U.S. Forest Service national grasslands, are usually not individually signed, but many are fenced and all are identified on certain maps.

Sovereign land has no “line in the sand” or section line or road or other marked boundary, except in a few small areas where lines or borders were determined because of court challenges. In all other cases, sovereign land is the area below the ordinary high watermark on navigable lakes and streams.

The usual contention is the location of the ordinary high watermark. Again, state law provides a definition: “...that line below which the action of the water is

frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.”

The definition on paper, however, is seldom easily applied to actual boundaries on land. To further complicate the issue, rivers can gradually change course over a period of years. Land considered below the ordinary high watermark now might be high and dry in 40 years and might not meet the sovereign land definition. In that same 40 years, a river could erode adjacent private land into a sovereign land sandbar. Such is the nature of rivers.

The Doctrine of Public Trust

The concept of sovereign lands and navigable waterways dates to colonial times and the early years after the United States government formed. The federal government gave to the original states – and made provisions for all states that would eventually join the union – title to sovereign lands. The theory was that use of the water for navigation, fishing and commerce was by its very nature, public.

When it was admitted to the union, the state of North Dakota took title to the beds of its navigable rivers and lakes. Various court cases over the years have determined that the state’s interest extends to the ordinary high watermark. This is an important distinction that validates perhaps thousands of acres of sovereign lands in North Dakota.

North Dakota law states: “Sovereign lands may not be permanently relinquished but must be held in trust for the benefit of the citizens of the state of North Dakota.”

State Responsibility

The Office of State Engineer is primarily responsible for managing and administering sovereign lands, though the Board of University and School Lands also has some authority, generally relating to mineral rights. The state engineer can enter into agreements for use of that land, such as management for public use, livestock grazing, mining, bank protection and others. Adjacent or “riparian” landowners can, without permit, maintain certain projects such as boat docks, boat ramps and irrigation water intakes on sovereign land. Such projects, however, cannot



Fred Rockman

Aerial view of the confluence of the Yellowstone (below) and Missouri rivers southwest of Williston in spring 2001. The outlined area is one of several in this part of the state where questions are surfacing over the boundaries of private land and public sovereign land. An adjoining landowner now claims the land is private. Bowhunters have for years assumed the land fell within the definition of sovereign land.

preempt public recreational use of sovereign land.

The state also has a sovereign lands advisory board. Members include the state engineer, commissioner of university and school lands, director of state parks and recreation, game and fish department director, state health officer, and manager of the Garrison Diversion Conservancy District. The board is solely advisory and cannot require the state engineer or board of university and school lands to follow its recommendations.

The state engineer must also request comments on sovereign land permit applications from a number of government agencies and bodies, including the North Dakota Game and Fish Department.

While the Game and Fish Department

has no authority over sovereign lands, the agency and the state engineer's office are trying to develop ways to address the potential for conflict when boundaries are not clearly marked or defined. Game and Fish, says Mike McKenna, chief of the Department's conservation and communications division, wants to make sure that people who buy hunting, fishing and trapping licenses are fairly treated. "We want to make sure people have access to, and opportunity to enjoy, the lands they have a right to be on," McKenna said.

So far, McKenna added, conflicts are few. State officials hope that greater familiarity with sovereign land laws, and better understanding of the complexities involved, will help keep it that way.

CRAIG BIHRLE is the Game and Fish Department's communications supervisor.